DOCKET NO. 448 – Cellco Partnership d/b/a Verizon Wireless application for a Certificate of Environmental Compatibility and Public Need for the construction, maintenance, and operation of a telecommunications facility located at Orange Tax Assessor Map 77, Block 3, Lot 1, 831 Derby Milford Road, Orange, Connecticut.	}	Connecticut Siting Council

January 8, 2015

Conclusions of Law

A. The public hearing procedure was consistent with due process requirements.

On May 13, 2014, Cellco Partnership d/b/a Verizon Wireless (Applicant) submitted to the Connecticut Siting Council (Council) an application for a Certificate of Environmental Compatibility and Public Need (Certificate) for the construction, maintenance and operation of a telecommunications facility located at 831 Derby Milford Road in Orange, Connecticut. Proceedings held on applications for Certificates are subject to the provisions of the Uniform Administrative Procedure Act (UAPA) and the Public Utility Environmental Standards Act (PUESA). Under the UAPA, each party and the agency conducting the public hearing shall be afforded the opportunity to respond, to cross examine other parties, intervenors and witnesses, and to present evidence and argument on all issues involved.[1] According to the state Supreme Court, an agency is not required to use the evidence and materials presented to it in any particular fashion as long as the conduct of the hearings is fundamentally fair and due process requires not only that there be due notice of a hearing, but at the hearing parties involved have a right to produce relevant evidence, and an opportunity to know the facts on which the agency is asked to act, to cross examine witnesses and to offer rebuttal evidence.[2] Public hearings were held on July 17, 2014, August 12, 2014, September 16, 2014 and October 23, 2014.

During a pre-hearing teleconference held by the Council on June 24, 2014, the Applicant and interested persons were afforded an opportunity to discuss procedures for before, during and after the public hearings. The Council announced dates for submission of requests for party or intervenor status, pre-filed testimony, issuance of pre-hearing interrogatories and responses to pre-hearing interrogatories.[3] On July 11, 2014, Albert Subbloie, Jacqueline Barbara, Glenn MacInnes and Jill MacInnes (Subbloie, et al) filed a request to intervene.[4] During the public hearing held on July 17, 2014, the Council granted the Subbloie, et al request for intervenor status. On July 24, 2014, Senator Slossberg, Representative Davis, Representative Klarides and Representative Maroney (Slossberg, et al) filed a request to intervene.[5] During a special meeting of the Council held on July 29, 2014, the Council granted the Slossberg, et al request for intervenor status and exercised its discretion under Conn. Gen. Stat. §16-50n(c) to group Subbloie, et al and Slossberg, et al (hereinafter, Intervenors) based on their identical interests evidenced in their respective requests for intervenor status.[6] On July 18, 2014, July 30, 2014, August 13, 2014 and September 17, 2014, the Council issued memoranda addressing how continued evidentiary hearings in this matter would proceed. In each memo, the Council indicated deadline dates for the submission of additional interrogatories and pre-filed testimony.[7]

It is well settled that parties to quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right.[8] According to the state Supreme Court, "Pre-trial discovery may be expressly authorized

[1] Conn. Gen. Stat. §4-177c (2013).
[2] *Grimes v. Conservation Commission,* 243 Conn. 266 (1997); *Connecticut Fund for the Environment v. Stamford*, 192 Conn. 247 (1984); *Palmisano v. Conservation Commission*, 27 Conn. App. 543 (Conn. App. 1992).
[3] Pre-Hearing Teleconference Memo, June 17, 2014 and Hearing Procedure Memo, June 24, 2014.
[4] Intervenors' 1 (Request to Intervene, July 11, 2014); Findings of Fact ¶3.
[5] Intervenors' 2 (Request to Intervene, July 24, 2014); Findings of Fact ¶3.
[6] Evidentiary Hearing Continuation Memorandum, July 30, 2014; Findings of Fact ¶3.
[7] Evidentiary Hearing Continuation Memoranda, July 18, 2014, July 30, 2014, August 13, 2014, September 17, 2014.
[8] *Pet v. Department of Health Services,* 228 Conn. 651 (1994).

by statute, but, absent an express provision the extent to which a party to an administrative proceeding is entitled to discovery is determined by the rules of the particular agency" and "constitutional principles permit an administrative agency to organize its hearing schedule so as to balance its interest in reasonable, orderly and non-repetitive proceedings against the erroneous deprivation of a private interest."[9] It is therefore not unconstitutional for the Council, in good faith, to balance its statutory time constraints against a party's desire for more time to present their objections to a proposal.[10] On July 21, 2014, Intervenors filed a motion for a continuance, which was denied in part as it related to the postponement of the August 12, 2014 continued evidentiary hearing and granted in part as it related to limiting the scope of the August 12, 2014 hearing to continued cross examination of the Applicant and to schedule an additional evidentiary hearing date for September 16, 2014.[11] On August 5, 2014, Intervenors filed a second motion for a continuance to postpone the August 12, 2014 continued evidentiary hearing, which was rendered moot on the basis that Intervenors were in attendance at the August 12, 2014 hearing.[12] Consistent with the Council's disposition of Intervenors' first motion for a continuance dated July 21, 2014, the Council limited the scope of the August 12, 2014 hearing to continued cross examination of the Applicant by the Council and Intervenors.

Intervenors were afforded the opportunity to conduct cross examination required for a full and true disclosure of the facts. Intervenors issued two sets of pre-hearing interrogatories to the Applicant totaling 146 questions and cross examined the Applicant during the public hearings held on August 12, 2014, September 16, 2014 and October 23, 2014.[13] Intervenors were also afforded the opportunity to fully and fairly present evidence in opposition to the application. On September 12, 2014, Intervenors submitted pre-filed testimony and a report authored by their expert witness, Mr. David Maxson (Maxson).[14] Intervenors presented their case during the September 16, 2014 and October 23, 2014 hearings, including an opportunity to present direct testimony.[15] On October 21, 2014, two days before the final evidentiary hearing, Intervenors submitted a written request to submit a supplemental 36-page report authored by Maxson.[16] Despite the timing, during the final evidentiary hearing held on October 23, 2014, the Council voted to grant Intervenors' request to submit the supplemental report over the objection of the Applicant.[17] Therefore, the public hearing procedure was consistent with due process requirements.

1. Intervenors' substantial rights were not prejudiced by holding the public hearing in the City of Shelton.

Under Conn. Gen. Stat. §16-50*l*, applicants are required to submit an application to the Council accompanied by proof of service of such application on "each municipality in which any portion of such facility is to be located, …and any adjoining municipality having a boundary not more than two thousand five hundred feet

[9] *Id.; FairwindCT, Inc. v. Connecticut Siting Council,* 313 Conn. 669 (2014); *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474 (1990).
[10] *Id.*
[11] Evidentiary Hearing Continuation Memorandum, July 30, 2014; Findings of Fact ¶14.
[12] Transcript 3 at page 169.
[13] Applicant 11, 12, 15 (Responses to Intervenors' Interrogatories Set I, Part I; Set I, Part II; and Set II).
[14] Intervenors 3-10 (Intervenors' Pre-Filed Testimony; Report of David Maxson, dated September 8, 2014).
[15] Evidentiary Hearing Continuation Memoranda July 18, 2014, July 30, 2014, August 13, 2014, September 17, 2014; Transcript 4 at pages 334-440; Direct Testimony of Senator Gayle Slossberg, Transcript 4 at pages 429-434; Transcript 5 at pages 572-620.
[16] Intervenors' Request to Submit Additional Information, dated October 21, 2014; Intervenors 12 (Supplemental Report of David Maxson, dated October 20, 2014).
[17] Transcript 5 at pages 584-586 (Baldwin: "As the Council stated at the beginning of this proceeding, this is the fourth hearing on this docket… We've submitted more than 150 interrogatories and responses… Now, on the eve, literally two days before this last hearing, additional evidence is submitted to the Council… That report was distributed to our witness panel yesterday. And I can tell you that that is simply not enough time to digest, to review, and to put ourselves in a position to rebut and produce cross-examination of Mr. Maxson's report.")

from such facility…" The location of the proposed telecommunications facility is within 2,500 feet of the City of Shelton. The applicant provided proof of service of the application on the City of Shelton, as well as proof of service of the application on other entities required to receive a copy of the application under Conn. Gen. Stat. §16-50*l*.[18] Pursuant to Conn. Gen. Stat. §16-50m, "At least one session of such hearing shall be held at a location selected by the council in the county in which the facility or any part thereof is to be located after six-thirty p.m. **for the convenience of the general public**…" (Emphasis added). Due to summer camps and other programs, the Town of Orange did not have a venue available to accommodate the Council's public hearing, which requires reservation of a venue between the hours of 1 PM and 10 PM for setup and breakdown of equipment.[19] Given the City of Shelton is within 2,500 feet of the proposed telecommunications facility, the availability of Shelton City Hall and the possibility of effects of the proposed facility on residents of Shelton, during a regular meeting held on June 12, 2014, the Council selected Shelton City Hall, which is within 3 miles of the proposed telecommunications facility site, as a suitable public hearing venue.[20] Pursuant to Conn. Gen. Stat. §16-50m, on June 17, 2014, the Council published general public notice of the July 17, 2014 public hearing in the New Haven Register and mailed notice of the public hearing to each person entitled under Conn. Gen. Stat. §16-50*l* to receive a copy of the application, including abutting property owners and state legislators in whose district the facility listed in the application is to be located.[21] On June 24, 2014, the Council held a pre-hearing teleconference during which the Council staff, Applicant and interested persons discussed procedural matters for the public hearing.[22]

The purpose of the hearing requirement after 6:30 PM under Conn. Gen. Stat. §16-50m is clearly "for the convenience of the general public." The Town of Orange is in New Haven County. The City of Shelton is in Fairfield County. Due to the unavailability of a suitable hearing venue in the Town of Orange and due to the fact that the City of Shelton is within 2,500 feet of the proposed telecommunications facility, the availability of Shelton City Hall and the possibility of effects of the proposal on Shelton residents, the Council determined that Shelton City Hall was a suitable hearing venue for the convenience of the general public, consistent with the purpose of the statute. Pursuant to Conn. Gen. Stat. §4-183(j) and under the Supreme Court decision in *Tele Tech v. Department of Public Utility Control,* a court may only overturn an agency decision if the court finds that the substantial rights of the person appealing the agency's final decision had been prejudiced.[23] If the appellant fails to show that their substantial rights have been prejudiced, even if procedural irregularities can be demonstrated, the argument fails.[24] Intervenors were provided personal notice of the public hearing by mail and general public notice by publication in the New Haven Register on June 17, 2014, wrote correspondence to the Council on June 17, 2014 specific to this point for which a detailed response was provided on June 24, 2014, participated in the pre-hearing teleconference held on June 24, 2014 and appeared at the public hearing that was held at the Shelton City Hall on July 17, 2014. Therefore, the Intervenors' substantial rights were not prejudiced by holding the public hearing in the City of Shelton.

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[18] Applicant 1 (Application); Findings of Fact ¶7.

[19] Correspondence from Senator Slossberg to Acting Executive Director Bachman, dated June 17, 2014 and Correspondence from Acting Executive Director Bachman to Senator Slossberg dated June 24, 2014; Transcript 2 at page 152 (First Selectman of the Town of Orange, James Zeoli, stated, "…I have to say, first, next time you need a hearing involving something in the Town of Orange, I ask that you please call the first selectman's office if you're told there's no room for you …, because we will find room for you in Orange. I don't know how that happened, but a couple of us do have a pretty good idea of what transpired there."); Findings of Fact ¶9.

[20] Council Meeting Minutes, June 12, 2014; Correspondence from Senator Slossberg to Acting Executive Director Bachman, dated June 17, 2014 and Correspondence from Acting Executive Director Bachman to Senator Slossberg dated June 24, 2014; Findings of Fact ¶9.

[21] Findings of Fact ¶10 and ¶13.

[22] Council June 17, 2014 Pre-Hearing Teleconference Memo and Council June 24, 2014 Hearing Procedure Memo.

[23] Conn. Gen. Stat. §4-183(j) (2013); *Tele Tech of Connecticut Corporation v. Dept. of Public Utility Control*, 270 Conn. 778 (2004); *Goldfisher v. Connecticut Siting Council*, 95 Conn. App. 193 (Conn. App. 2006).

[24] *Id.*

2. Intervenors' substantial rights were not prejudiced by the Council's denial of Intervenors' request of the Council to subpoena the property owner of the proposed telecommunications facility site.

During the public hearing held on August 12, 2014, Intervenors requested the Council to order the property owner of 831 Derby Milford Road to attend the next hearing due to questions that arose during the pendency of the proceeding as to whether or not the proposed telecommunications facility could be located elsewhere on the 34.6 acre property.[25] Pursuant to Conn. Gen. Stat. §16-50p(g), "in deciding whether to issue a certificate, the council shall in no way be limited by the applicant already having acquired land or an interest therein for the purpose of constructing the facility that is the subject of its application." In *Corcoran v. Connecticut Siting Council*, the Court interpreted this statute to be "an enlargement of the Council's discretion, not a limitation, permitting, but not obligating the Council to consider the likelihood of the applicant securing the proposed site."[26] In that case, the plaintiffs argued that the Council's approval of the application rested heavily on the fact that T-Mobile held a lease for the site and could not negotiate an alternate site on the property with the country club.[27] However, the Council has no power to compel a property owner to locate a facility elsewhere on its property.[28] As indicated by the Applicant's attorney during the August 12, 2014 public hearing, "any change from the leased parcel would require additional landlord approval."[29] If a property owner cannot reach an agreement with the Applicant as to an alternative location, the Council has no power to force the property owner to agree and the alternative location is therefore not a feasible alternative.[30]

During the hearing held on August 12, 2014, the Council inquired of the applicant as to whether the tower could be moved 90 feet south on the subject parcel to avoid impacts to vernal pools and Eastern Box Turtle habitat.[31] In responses to interrogatories and during cross examination during the September 16, 2014 hearing, the Applicant reported further discussions with the property owner regarding the feasibility of alternative locations on the subject property.[32] Notwithstanding the property owner's productive use of portions of the property for farming operations, the Applicant and the property owner were able to identify a location farther away from wetlands, closer to the property owner's house and further away from Rainbow Trail.[33] Additionally, during the pendency of the proceedings, the Applicant explored three additional alternative sites for the proposed facility that were suggested by the Intervenors, including property owned by the Town of Orange located at Tucker's Ravine, property owned by the Catholic Cemeteries Association located at 219 New Haven Avenue in Derby, and a residentially zoned parcel located at 803 Derby Milford Road in Orange, each of which were explored and deemed to be infeasible.[34] One additional site was suggested by Intervenors during the September 16, 2014 public hearing, but the precise location and availability of that site was not identified.[35]

Intervenors did not request the Council to subpoena the property owners of the three identified alternative sites nor did Intervenors call the property owner of the proposed site or the property owners of the three identified alternative sites as witnesses. Pursuant to Conn. Gen. Stat. §16-50o and Conn. Gen. Stat. §4-178, every party shall have the right to conduct cross-examination as may be required for a full and true disclosure of the facts. In *FairwindCT, Inc. v. Connecticut Siting Council,* the Court held that the plaintiffs were not

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[25] Transcript 3 at pages 302-306.
[26] *Corcoran v. Connecticut Siting Council,* 284 Conn. 455 (2007).
[27] *Id.*
[28] *Id.*
[29] Transcript 3 at page 304.
[30] *Corcoran, supra* note 26.
[31] Applicant 10 (Responses to Council Interrogatories); Transcript 3 at pages 209-218.
[32] Applicant 10 (Responses to Council Interrogatories); Transcript 4 at pages 471-476.
[33] *Id.*; Findings of Fact ¶55 and ¶¶139-144.
[34] Intervenors 3 (Pre-Filed Testimony of Gayle Slossberg); Applicant 9 (Response to Council request for Additional Information); Transcript 3 at pages 182-185; Findings of Fact ¶¶51-54.
[35] Transcript 4 at pages 435-438.

prejudiced by the Council's refusal to subpoena and allow the plaintiffs to cross examine an employee of the Department of Energy and Environmental Protection as the right to cross-examination was a matter of discretion for the Council and the Council reasonably could have determined, on the basis of the record before it, that cross examination was not required to allow the plaintiffs to present a full and true disclosure of the facts.[36] In this proceeding, on the basis of the Applicant's discussions with the property owner regarding the feasibility of alternative locations on the property for the proposed tower and the Applicant's responses to interrogatories on this point, cross examination of the property owner was not required to allow the Intervenors to present a full and true disclosure of the facts. Therefore, Intervenors' substantial rights were not prejudiced by the Council's denial of Intervenors' request of the Council to subpoena the property owner of the proposed telecommunications facility site.

B. The Council is preempted by the federal Telecommunications Act on a determination of public need whether public need is based on coverage or capacity.

The legislative purpose of the federal Telecommunications Act of 1996 (TCA) is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and *encourage the rapid deployment of new telecommunications technologies.*" (Emphasis added.)[37] In 2010, the Federal Communications Commission (FCC) released the National Broadband Plan (NBP) "to ensure every American has access to broadband capability."[38] Section 706 of the TCA specifically relates to Broadband Data Improvement and states, "The Commission and each State commission with regulatory jurisdiction over telecommunications services *shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability* to all Americans." (Emphasis added.)[39] Through the TCA and the NBP, Congress clearly vested the FCC with the authority to promulgate regulations to meet the stated goals and established that the FCC preempts state or local regulation on matters that are exclusively within the jurisdiction and authority of the FCC. Preservation of state or local authority extends only to placement, construction and modifications of facilities based on matters not directly regulated by the FCC, such as environmental impacts.[40] On October 21, 2014, the FCC released a Wireless Infrastructure Report and Order that found regulatory review processes can slow deployment of wireless infrastructure substantially and adopted rules to reduce regulatory obstacles to wireless facility siting and construction.[41]

The legislative purpose of the state PUESA is "to provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state."[42] Under §16-50p of the PUESA, "a public need exists when a facility

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[36] *FairwindCT, Inc. v. Connecticut Siting Council,* 313 Conn. 669 (2014).
[37] Council Administrative Notice 4 (TCA); Findings of Fact ¶¶21-27.
[38] Council Administrative Notice 18 (NBP); Findings of Fact ¶¶26-31.
[39] Council Administrative Notice 4 (TCA); Findings of Fact ¶¶26-31.
[40] *Id.*; *Verizon v. FCC,* 740 F.3d 623 (D.C. Cir. 2014) ("We think it reasonable to believe that Congress contemplated that the Commission would regulate this industry, as the agency had in the past, and the scope of any authority granted to it… both by the boundaries of the Commission's subject matter jurisdiction and the requirement that any regulation be tailored to the specific statutory goal of accelerating broadband deployment is not so broad that we might hesitate to think that Congress could have intended such a delegation."); *New York SMSA Limited Partnership, et al v. Town of Clarkstown*, 612 F.3d 97 (2nd Cir. 2010)(Town provisions setting forth a preference for "alternate technologies" preempted because of interference with FCC's regulation of technical and operational aspects of wireless telecommunications technology, a field that is occupied by federal law.); *Cellular Phone Taskforce, et al v. FCC,* 205 F.3d 82 (2nd Cir. 2000) (State and local governments are preempted from regulating the operation and construction of a national telecommunications infrastructure, including construction and operation of personal wireless communications facilities.); Council Staff Report, dated October 17, 2014.
[41] Council Administrative Notice 20 (FCC Wireless Infrastructure Report and Order).
[42] Conn. Gen. Stat. §16-50g, *et seq.* (2013).

is necessary for the reliability of the electric power supply of the state."[43] In 2011, Governor Malloy vetoed Public Act 11-107 on the basis that "the language of the proposed bill would apply an illogical standard of review to applications for the siting of proposed cell towers."[44] Specifically, Public Act 11-107 proposed the following language, "The Council shall not grant a certificate for a [telecommunications] facility… unless it finds and determines a **public benefit** for the facility…" (Emphasis added.)[45] Under §16-50p of the PUESA, "a public benefit exists when a facility is necessary for the reliability of the electric power supply of the state or for the development of a competitive market for electricity."[46] Selection of the term "public benefit" over the term "public need" in Public Act 11-107 is telling despite the fact that both terms are equally inapplicable to telecommunications facilities. It is further evident in the passage of Public Act 12-165, the successor to Public Act 11-107, where new language included the phrase, "…the Council shall not render any decision pursuant to this subparagraph that is **inconsistent with federal law or regulations**" (Emphasis added).[47] Clearly, this language was inserted with the recognition that the Council is preempted by the FCC on a determination of public need and that the definition of "public need" under the state PUESA does not apply to telecommunications facilities.

In accordance with FCC regulations, Verizon holds FCC licenses to provide wireless services in the 700 MHz, 850 MHz, 1900 MHz and 2100 MHz frequency ranges and pursuant to these licenses, Verizon maintains and operates a network of cell sites to serve the demand for advanced wireless services, including telecommunications coverage and capacity.[48] Consistent with the purposes of the TCA and the NBP, Verizon's proposed facility would provide mobile wireless broadband services and personal wireless services.[49] The FCC reports that demand for wireless capacity is booming, but the ability to meet this demand depends on the infrastructure that supports the services.[50] In response, the FCC adopted rules to facilitate the deployment of the infrastructure necessary to support surging demand, expand broadband access, support innovation and wireless opportunity and enhance public safety.[51] Based on the provisions of the TCA related to rapid deployment of new telecommunications technologies, the interpretations of those provisions in federal case law, and the FCC rules adopted to reduce regulatory obstacles in the FCC Wireless Infrastructure Report and Order, Congress clearly intended for the FCC to have exclusive jurisdiction and preempt state or local regulation on these matters. Therefore, the Council is preempted by the federal TCA on a determination of public need whether public need is based on coverage or capacity.

C. The PUESA does not require public disclosure of proprietary information.

During the public hearing held on September 16, 2014, Intervenors requested submission of the Applicant's link budget, drive data analysis and traffic map analysis, which the Applicant represents to be confidential and proprietary, on the basis that the Applicant is relying upon that information to establish its claim that there is a public need for the tower.[52] After the Intervenors and Applicant were afforded an opportunity to be heard on the request and members of the Council were afforded an opportunity to comment on the request during the public hearing, the Council Chairman denied the request on the basis that the Council does not need the additional information to make a decision and will rely on the combination of experts before it.[53] On October 10, 2014, Intervenors submitted a renewed Motion for Order to Compel Production of Documents arguing

[43] Conn. Gen. Stat. §16-50p(c)(3) (2014).
[44] Council Staff Report, dated October 17, 2014.
[45] *Id.*
[46] Conn. Gen. Stat. §16-50p(c)(3) (2014).
[47] Council Staff Report, dated October 17, 2014.
[48] Applicant 1 at page 8; Findings of Fact ¶¶35-40.
[49] Applicant 1 at page 9; Council Staff Report, dated October 17, 2014; Findings of Fact ¶¶34-40.
[50] Council Administrative Notice 20 (FCC Wireless Infrastructure Report and Order).
[51] *Id.*
[52] Transcript 4 at pages 553-562.
[53] *Id.*

that the Applicant cannot fairly and consistent with due process be permitted to pursue a contested application claiming that the proposed facility is needed in order to provide capacity relief, while simultaneously withholding from disclosure to the Council and the Intervenors opposing the application documents that may undermine Applicant's capacity claim relief.[54] In support of their argument, Intervenors refer to the Applicant's response to the Council's Interrogatory No. 10, regarding the tools/methodology used by Cellco to establish capacity need in the proposed service area. The Applicant's response states, "Cellco evaluates historic cell site performance and utilization data, together with cell site traffic growth data for each of its cell sites on a monthly basis. This data allows Cellco to forecast when any individual or combination of cell sites will reach their maximum capacity. The cell site performance and utilization data and traffic growth data is competitively sensitive information that Cellco cannot share publicly."[55] The Council accepted this response on the basis that cell site performance and utilization data are matters directly regulated by the FCC under the TCA and did not request the Applicant to provide further information. Additionally, in support of their argument, Intervenors refer to the Applicant's response to Intervenors' Interrogatory No. 57 [66] and Interrogatory No. 58 [67] regarding Intervenors' request for copies of any documents pertaining to traffic maps of the eight existing sectors that Verizon prepared and/or reviewed. The Applicant's responses state, "Cellco's RF Design Engineers use this customer specific data, along with other data, as part of its overall needs analysis. The customer specific information described in response to Question 58 [67] above is confidential information that Cellco cannot disclose."[56] It is well established that matters related to customer specific information are exclusively within the jurisdiction of the FCC in accordance with FCC regulations promulgated under the TCA.[57]

During the public hearing held on October 23, 2014, the Council denied the Intervenors' renewed Motion for Order to Compel Production of Documents on the basis that the Applicant has provided sufficient information to demonstrate need that the Intervenors have the opportunity to challenge and that Maxson's October 20, 2014 supplemental report "actually renders the motion to compel moot, since he… basically shows that he does not need the information to present his side of the argument."[58] Unlike courts, administrative agencies can act both as investigator and adjudicator without violating due process.[59] Factual determinations must be sustained if they are reasonably supported by substantial evidence in the record taken as a whole.[60] In making factual determinations an administrative agency is not required to believe a witness, even an expert, nor is it required to use in any particular fashion any of the materials presented to it so long as the conduct of the hearing is fundamentally fair.[61] In contested cases, the agency's experience, technical competence and specialized knowledge may be used in the evaluation of the evidence.[62] It is therefore well established that the Council has a right to evaluate the credibility of witnesses and to give the weight it finds appropriate to the evidence.

Furthermore, in Intervenors' Reply Brief to Cellco's Objection to Intervenors' Motion for Order to Compel Production of Documents, Intervenors cite to *Office of Consumer Counsel v. Department of Public Utility Control,* to support the argument that Applicant's link budget, drive data analysis and traffic map analysis are documents that are relevant to the proceeding.[63] Conn. Gen. Stat. §4-177c states, "In a contested case, each party and the

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[54] Intervenors Motion for Order to Compel Production of Documents, dated October 10, 2014.
[55] Applicant 3 (Responses to Council Interrogatories, Set I); Findings of Fact ¶41.
[56] Applicant 15 (Responses to Intervenors' Interrogatories, Set II); Findings of Fact ¶41.
[57] Council Administrative Notice 4 (TCA); Council Staff Report, dated October 17, 2014.
[58] Transcript 5 at pages 575-581; Intervenors 12 (Maxson Supplemental Report, dated October 20, 2014).
[59] *Grimes v. Conservation Commission*, 243 Conn. 266 (1997).
[60] *Office of Consumer Counsel v. Department of Public Utility Control*, 246 Conn. 18 (1998).
[61] *Huck v. Inland Wetlands and Watercourses Agency,* 203 Conn. 525 (1987); *Omnipoint Communications, Inc. v. City of White Plains*, 430 F.3d 529 (2nd Cir. 2005).
[62] Conn. Gen. Stat. §4-178 (2014); *FairwindCT, Inc. v. Connecticut Siting Council,* 313 Conn. 669 (2014).
[63] Intervenors' Reply Brief to Cellco's Objection to Intervenors' Motion for Order to Compel Production of Documents, dated October 17, 2014, citing *Office of Consumer Counsel v. Department of Public Utility Control,* 44 Conn. Supp. 21 (Conn. Super. Ct. 1994).

agency conducting the proceeding shall be afforded the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, **except as otherwise provided by federal law**…" (Emphasis added). Unlike the circumstances in *Office of Consumer Counsel v. Department of Public Utility Control,* the Applicant is not a public service company and the documents requested to be submitted regarding customer-specific data, technical and operational aspects of the Applicant's network are matters that are directly regulated by the FCC under the TCA.[64] Preservation of state authority extends only to placement, construction and modification of telecommunications facilities based on matters not directly regulated by the FCC, such as environmental impacts.[65] It is well established that the FCC directly regulates matters related to network operations and customer information.

Conn. Gen. Stat. §16-50o requires submission into the record "the terms of any agreement… entered into by the applicant and… any third party, in connection with the construction or operation of [a] facility," but does "not require the public disclosure of proprietary information or trade secrets."[66] The statute recognizes that the Council has the right to limit public disclosure of proprietary information and trade secrets. Furthermore, the Freedom of Information Act also provides an exception for trade secrets and financial information.[67] In *Rosa v. Connecticut Siting Council,* the court recognized the statute imposes a requirement on the applicant, does not impose a requirement on the Council and does not impose a penalty for non-compliance. [68] In that case, the court held that the Council did not abuse its discretion or act illegally by not requiring the applicant to submit agreements that the parties conceded did not contain relevant information.[69] During the evidentiary hearing held on September 16, 2014, Maxson was asked of his report, "Do you need Verizon's dominant server information to create any refinements to this map?"[70] Maxson replied, "I do not."[71] During the evidentiary hearing held on October 23, 2014, the Council admitted Maxson's supplemental report into the record over the objection of the Applicant and cited to language in the supplemental report when voting to deny the renewed Motion for Order to Compel Production of Documents. Maxson states, "The applicant's alternative is no alternative because it relies on a secret sauce of **irrelevant data analysis**. Contrary to the applicant's assertions, drive testing and link budget details are **not necessary to assess the potential benefits of a proposed facility** and traffic mapping is only useful in evaluating a proposed cell site if it shows a concentrated area of usage (not the case here) and is performed in conjunction with dominant server analysis to show how that usage will be redistributed to a new sector (not disclosed by the applicant) (Emphasis added).[72] Here, as in *Rosa*, Intervenors conceded that the requested link budget, drive data analysis and traffic map analysis do not contain relevant information. Therefore, given the PUESA does not require public disclosure of proprietary information, the FCC directly regulates matters related to network operations and customer information, and the UAPA requires submission of relevant information, Intervenors were not prejudiced by the absence of the concededly irrelevant link budget, drive data analysis and traffic map analysis from the record.

[64] Council Administrative Notice 4 (TCA); Council Staff Report, dated October 17, 2014; Conn. Gen. Stat. §16-1 (4) (2014).
[65] *Id.;* See also *supra* note 40.
[66] Conn. Gen. Stat. §16-50o (2013).
[67] Conn. Gen. Stat. §1-210(b)(5)(2013).
[68] *Rosa v. Connecticut Siting Council*, 2007 Conn. Super. LEXIS 590 (Conn. Super. 2007)
[69] *Id.*
[70] Transcript 4 at pages 362-363.
[71] *Id.*
[72] Intervenors 7 (Maxson Supplemental Report, dated October 20, 2014).